Calendar No. 750

100TH CONGRESS *2d Session*	SENATE	REPORT 100-392

REAUTHORIZATION OF THE OFFICE OF GOVERNMENT ETHICS

REPORT

OF THE

COMMITTEE ON GOVERNMENTAL AFFAIRS UNITED STATES SENATE

TO ACCOMPANY

S. 2344

together with

ADDITIONAL VIEWS

TO PROVIDE FOR THE REAUTHORIZATION OF APPROPRIATIONS FOR THE OFFICE OF GOVERNMENT ETHICS, AND FOR OTHER PURPOSES

JUNE 21 (legislative day, JUNE 20), 1988.—Ordered to be printed

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REAUTHORIZATION OF THE OFFICE OF GOVERNMENT ETHICS

JUNE 21 (legislative day, JUNE 20), 1988.—Ordered to be printed

Mr. GLENN, from the Committee on Governmental Affairs, submitted the following

REPORT

together with

ADDITIONAL VIEWS

[To accompany S. 2344]

The Committee on Governmental Affairs, to which was referred the bill (S. 2344) to extend the authorization of appropriations for the Office of Government Ethics for 6 years, having considered the same, reports favorably thereon with two amendments and recommends that the bill as amended do pass.

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I. PURPOSE

The purposes of S. 2344 are to ensure an effective ethics system and to prevent conflicts of interest throughout the Executive Branch by, among other things, making the Office of Government

Ethics an independent agency, permitting removal of the Director only for good cause, clarifying the Director's authority to order action, and extending the Office's authorization for six years.

II. Background

A. Brief History of the Office of Government Ethics

The Office of Government Ethics (OGE) was created by Title IV of the Ethics in Government Act of 1978 (Ethics Act). A 1976 report to Congress by the General Accounting Office (GAO) identified a number of problems with the federal government's ethics system, including a lack of uniformity of Executive Branch financial disclosure requirements; inadequate interpretations of standards of conduct regulations; and untimely and unsatisfactory resolutions of ethical problems. However, GAO concluded that the "major and perhaps the most substantial contributing factor" to all these problems was "the decided lack of a central supervisory authority." GAO concluded that an Executive Branch ethics office was needed to improve the ethics system, with the specific authority to direct, monitor, and enforce compliance by both agencies and officials.

On May 3, 1977, President Carter submitted a draft of proposed legislation to promote ethical standards throughout the Executive Branch. In that legislation, the President proposed the creation of the Office of Government Ethics because "an effective oversight office is essential if strict ethical requirements are to be enforced throughout the government." Later in 1977, the Senate Committee on Governmental Affairs reported S. 555, the Public Officials Integrity Act. The basic concepts of S. 555 were incorporated into the Ethics Act, which was signed into law on October 26, 1978, as Public Law 95-521.

The 1978 Ethics Act created OGE within the Office of Personnel Management (OPM) to provide "overall direction of executive branch policies related to preventing conflicts of interest on the part of officers and employees of any executive agency." The OGE Director was given numerous responsibilities, including developing and interpreting ethics rules and regulations, reviewing financial disclosure statements, and ordering compliance action. OGE was originally authorized for five years, through September 30, 1983.

The Office was reauthorized for another five years in 1983 through S. 461, which was signed into law as Public Law 98-150. S. 461 was reported by the Senate Governmental Affairs Committee and amended by the House Committee on the Judiciary and the House Committee on Post Office and Civil Service. As finally passed, the law extended the authorization for OGE until September 30, 1988, and clarified the Office's authority and independence. Specifically, the 1983 reauthorization—

—established a five year term for each OGE Director appointed on or about October 1, 1983;

—gave OGE greater independence from OPM, allowing OGE to operate "in consultation with" rather than "under the general supervision of" OPM;

—required a separate budget line for OGE;

—permitted the OGE Director to request assistance from the Inspector General (IG) of an agency in conducting investigations involving financial disclosures; and
—required OGE to review the financial disclosure reports of high-level White House aides.

There were a number of changes to OGE's authority and independence which were recommended by the Senate Governmental Affairs Committee and approved by the Senate but which were not included in the final version of the legislation that passed both Houses. For example, the Senate bill proposed that the OGE Director be removable only "for good cause" and that OGE be allowed to issue regulations independent of OPM. The bill also proposed that the OGE Director be allowed to request the assistance of Inspectors General on any investigation, not just those involving the review of financial disclosure requirements.

In addition to OGE, the Executive Branch ethics system is comprised of ethics counselors and other officials in the agencies. OGE regulations (5 CFR 738.202) require each agency head to appoint a designated agency ethics official (DAEO) and an alternate to administer the agency's ethics program. These officials have the primary responsibility for maintaining the agencies' ethics program. They and other agency officials, including the IG, may refer suspected violations of criminal conflict of interest laws to the Department of Justice for investigation and possible prosecution.

B. OGE STRUCTURE, BUDGET, AND STAFFING

Organizationally, OGE is an office within OPM. Although it was granted a separate line item in the 1983 reauthorization to ensure that it has adequate resources to perform its responsibilities, OGE still must submit its budget through OPM. Acquisitions and the hiring of support staff must also be done through OPM. Professional staff members may be hired directly by OGE.

OGE is headed by a Director, who is appointed by the President by and with the advice and consent of the Senate to a five-year term of office. The five-year term was added in 1983 to provide continuity in the management and policies of the Office. However, the Director serves at the pleasure of the President.

In addition to the Director, the Office is staffed with a Deputy Director, who oversees the Monitoring and Compliance Division staff of nine management analysts, and a Chief Counsel, who reviews the work of seven attorneys. The OGE legal staff assists in drafting regulations and provides advice on Executive Branch ethics issues through written advisory opinions and telephone inquiries. The attorneys also consult with agency ethics officials. The management analysts in the Monitoring and Compliance Division conduct audits of agency ethics programs and review annual and termination public financial disclosure reports filed by presidential appointees. OGE attorneys and analysts also participate in OGE training courses.

Although the Ethics Act authorized up to $2 million for OGE for each fiscal year from 1979 through 1988, OGE's budget level did not reach the $1 million mark until FY 1983. OGE staffing has also been modest, with its high point being in FY 1988 with 30 full-time

equivalent (FTE) staff positions authorized by the Office of Management and Budget (OMB). As of May 1988, the Office had a staff of 27 persons. The budget and staff levels of OGE for FY 1980–1988 have been as follows:

	Budget level (thousands)	Staff positions (FTAE)
Fiscal year:		
1980	$637	16.0
1981	938	26.0
1982	951	23.4
1983	1,016	23.5
1984	1,049	21.4
1985	1,128	22.7
1986	1,106	22.7
1987	1,303	21.5
1988	1,578	30.0

C. RESPONSIBILITIES OF THE OGE DIRECTOR

The responsibilities of the OGE Director may be grouped into four general areas: enforcement, issuance of regulations, financial disclosure review, and rule interpretation/training.

1. Enforcement

OGE has significant ethics enforcement responsibilities, particularly ordering "corrective action" on the part of employees and agencies and monitoring agency ethics programs.

a. Ordering "corrective action"

Subsection 402(b)(9) of the Ethics Act gives the OGE Director the authority to "order corrective action on the part of agencies and employees which the Director deems necessary." The OGE Director has had this authority since the Ethics Act became law in 1978. At that time, the Governmental Affairs Committee described the scope of this authority in Senate Report No. 95–170. This subsection of the Act, the Report said,

> grants the Director the authority to order corrective action by agencies and employees as he deems necessary. In performing this responsibility to monitor compliance with the disclosure provisions of this statute, the Director might discover that an agency has failed to comply with this statute or related laws or regulations governing standards of conduct. In such cases the Director is empowered to order an agency to comply with applicable regulations and to direct the type of corrective action the agency must take. In other cases, the Director may discover that an employee has failed to take a necessary action to avoid a conflict of interest. In such an instance, the Director may order the employee to take such action and recommend appropriate administrative action to the individual's agency.

OGE has conducted what it terms independent "inquiries" into conflict of interest allegations brought to their attention pursuant

to their ability to order "corrective action." Allegations come to OGE's attention in a variety of ways, including the press, agency ethics officials, and other agency employees and officials. On at least three occasions, the OGE Director has ordered individuals to cease actions which he believed were in violation of ethics rules or standards of conduct. The Director also ordered that changes be made in agency policies to prevent recurrence of the violations in two of the cases. In the most recent instance, the Director recommended that the head of the agency take administrative action against the individual involved in the allegation.

Also, OGE reported to the Committee the following actions it ordered or obtained from Senate-confirmed nominees as part of the confirmation process from calendar year 1984 through 1987:

Type of action	Number of actions			
	1984	1985	1986	1987
Recusal	22	53	15	40
Divestiture	4	8	6	11
Blind trust	1	6	11	5
Resignation (from other than present employment)	10	10	9	9

Under current law, if an employee or an agency does not comply with the Director's order or recommendation for action, OGE may notify the agency head or the President and/or make its findings public.

b. Monitoring agency ethics programs

OGE's Monitoring and Compliance staff conducts comprehensive reviews of agency ethics programs in both the headquarters and regional offices of approximately 130 agencies. In particularly large agencies, OGE reviewers will select a segment of the agency for analysis rather than attempting to cover all components. The reviews take from two or four weeks, and cover a wide range of ethics-related activities, including agency financial disclosure review systems and training. When problems are discovered, OGE refers to work with the agency to resolve the problems and to avoid adversarial relationships. However, the OGE Director does have the authority to order agencies to take action to improve their ethics programs, should the consultative approach fail.

OGE's goal is to review each agency's ethics program once every three years, although that schedule is seldom met. OGE has reviewed larger agencies' programs about once every four years and smaller agencies' programs about once every five years. OGE said that lack of staff prevents more frequent reviews. The number of OGE agency compliance reviews conducted and audit reports issued for calendar years 1984 through 1987 are presented below:

AGENCY COMPLIANCE REVIEWS

	1984	1985	1986	1987
Headquarters reviews	17	22	22	16
Regional reviews	4	11	8	5

At the request of the Committee's Subcommittee on Oversight of Government Management, GAO reviewed OGE's operations in the fall of 1987 and contacted 14 DAEOs to obtain their views on OGE's performance. Most DAEOs GAO contacted, as well as both the current and former DAEOs who testified at the Committee's hearings, spoke well of OGE's reviews of agency programs. Such reviews can point out program deficiencies that should be corrected and, thus, can result in an improved federal ethics system. OGE officials told GAO that the agencies are generally cooperative in complying with OGE's recommendations for programmatic improvements.

2. Issuance of regulations

Subsections 402(b)(1), (2), and (15) of the Ethics Act, as amended, give the Directors the responsibility to develop, in consultation with the Attorney General and OPM, rules and regulations pertaining to conflicts of interest and ethics in the Executive Branch. Prior to the 1983 reauthorization, OGE could only recommend rules and regulations to OPM. Until that time, OGE had issued regulations through OPM implementing the Executive Branch financial disclosure system established by Title II of the Act (5 CFR 734) and the post-employment conflict of interest requirement established by Title V of the Act (5 CFR 737), as well as the implementing regulations governing its own operations (5 CFR 738).

Since the 1983 reauthorization, when OGE was given the authority to issue rules and regulations directly, OGE has developed only one set of regulations. In December 1986, OGE published proposed regulations implementing the confidential financial disclosure system established by Executive Order 12565 of September 26, 1986. However, as of May 1988, OGE has not issued these regulations as final.[1] Neither has OGE issued regulations on any of the criminal conflict of interest laws covering current employees or other ethics matters with government-wide effect, such as how to implement recusal policies. OGE has said that they intend to publish final confidential disclosure regulations this year. In response to prehearing questions, OGE said that a comprehensive review of the conflict of interest statutes may be needed and that OGE and the Justice Department have already discussed the issuance of detailed guidance for one of the conflict of interest statues, 18 U.S.C. 208.

3. Review of financial disclosure reports

Titles II and IV of the Ethics Act give OGE both general and specific responsibilities for the review of public financial disclosure reports. OGE reviews the nomination, annual, and termination reports of all Senate-confirmed Presidential appointees, high-level White House officials (as of the 1983 reauthorization), all designated agency ethics officials, and the President and the Vice President. OGE testified that it works closely with agency ethics offi-

[1] Most agencies have continued to require employees to complete confidential reports in the absence of these regulations. However, the Justice Department has taken the position that its employees are not required to complete these reports because no confidential disclosure regulations exist.

cials to ensure that the reports are accurate and complete. Title II of the Ethics Act requires OGE to review financial disclosure reports within 60 days after they are transmitted to the Office.

The number of public financial disclosure reports reviewed by OGE each year since the 1983 reauthorization are as follows:

PUBLIC FINANCIAL DISCLOSURE REPORTS REVIEWED

	Nomination	Annual	Termination	Total
Calendar year:				
1983	242	727	94	1,063
1984	180	762	57	999
1985	292	881	125	1,298
1986	305	756	101	1,162
1987	299	653	135	1,087

OGE reviews significantly more financial disclosure reports during Presidential transition periods, as the Office is required to review and approve disclosure reports from all Presidential nominees confirmed by the Senate. During the 1980–81 transition, for example, OGE reviewed reports from 615 nominees, averaging four days for each review.

4. Rule interpretation training

One of OGE's most important roles is the interpetation of ethics rules and regulations and provision of guidance to agency ethics officials and others about conflict of interest problems. On a daily basis, OGE provides extensive advice and interpretations of ethics rules through meetings with individual agency ethics officials and by telephone. Over half of the 14 DAEOs GAO interviewed during their review for the Subcommittee said they consult with OGE on ethics matters "often" or "very often," and almost all of those doing so said OGE's consultation was helpful.

OGE has also carried out this responsibility in two other ways: formal and informal advisory opinions issued to agencies and formal training classes and materials.

a. Formal and informal opinions

The Ethics Act makes OGE responsible for establishing a "formal advisory opinion service," whereby OGE provides advice on important ethics matters. OGE regulations (5 CFR 738, Subpart C) describe the manner in which formal opinions may be requested of OGE and the process by which comments on those opinions are to be received. A May 19, 1980, memorandum of agreement between OGE and the Department of Justice provides that OGE will consult with the Department before issuance of any formal opinion and that the Justice Department will not prosecute an individual who relies on any such opinion.

Since 1983, OGE has issued no formal advisory opinions. The Office received one request for a formal opinion which met the requirements and criteria of the regulations, but the request was subsequently withdrawn. OGE has, however, issued more than 200 informal opinions since 1983 through written responses to letters and through a series of memoranda sent to all DAEOs, IGs, and Gener-

al Counsels. A number of these letters and memoranda address issues that have not been addressed before or do so in a fashion that would be of interest to agency ethics officials. After excising any identifying information, OGE numbers and indexes these letters and places them in the OGE library. A digest of these letters and memoranda are sent annually to each agency. An official in the Justice Department's Public Integrity Section told Committee staff by telephone that while their memorandum of agreement with OGE covers only formal advisory opinions, they would probably not prosecute an individual who relies on an informal opinion.

The number of informal written advisory opinions produced each year from 1984 through 1987 is presented below, along with the number of excised library copies of those opinions for each year:

INFORMAL ADVISORY OPINIONS

	1984	1985	1986	1987
Written opinions (memos and letters)	55	57	43	50
Excised library copies of opinions	16	19	19	14

b. Training classes/materials

OGE also uses formal training classes to provide information to agency ethics officials and others from outside the federal government. During calendar years 1983 through 1987, OGE held over 90 one-day training courses for agency ethics officers in 14 cities. In calendar year 1986 alone, OGE conducted 92 separate training sessions at OPM's Executive Seminar Centers, reaching over 3,000 people. In addition to these classes, OGE also held annual conferences from 1980 until 1984 in which agency ethics officials and other professionals could meet and discuss ethics-related issues and exchange information. Since then, however, OGE has not held these annual ethics conferences. In 1985, OGE presented a half-day seminar on the criminal conflict of interest statutes. In 1986, OGE held a seminar focusing on recurring problems with public financial disclosure reports.

OGE has also:

—published the Ethics Newsgram on a quarterly basis since May 1984, which is designed to disseminate information about the Executive Branch ethics program to agency ethics officials;

—published a training pamphlet in 1986 on the standards of conduct and conflict of interest statutes entitled "How To Stay Out of Trouble," and

—produced videotapes in 1987 and 1988 on "How to Complete the Executive Personnel Financial Disclosure Report" and "Public Service, Public Trust," respectively, which review conflict of interest laws and regulations applicable to Executive Branch employees.

D. OGE'S RELATIONSHIP WITH AGENCY OFFICIALS

While the Ethics Act makes OGE the major ethics policy maker for the Executive Branch, the heads of each agency are responsible for establishing, maintaining, and carrying out their agency's

ethics program. OGE regulations (5 CFR 738.202) require the head of each agency to appoint an individual to serve as the designated agency ethics official (DAEO). The responsibilities of the DAEOs include reviewing financial disclosure reports, providing ethics education and training programs, and monitoring administrative actions and sanctions, while maintaining a liaison with OGE.

OGE and the agencies also work together in other ways. Subsection 402(b)(10) of the Ethics Act requires agencies to provide such reports as the Director deems necessary. Section 403 of the Act requires the agency heads to make their agencies' "services, personnel, and facilities available to the Director to the greatest practicable extent for the performance of functions under the Act". Section 404 permits the Director to "request assistance from the Inspector General of an agency in conducting investigations pursuant to subsections (b)(3) and (b)(4) of section 402."

III. Need for and History of S. 2344

The 1983 OGE reauthorization ends on September 30, 1988. In anticipation of this sunset date, the Committee, through its Subcommittee on Oversight of Government Management, held hearings on April 12 and April 13, 1988. On April 12, the Subcommittee reviewed, in general, the Ethics in Government Act in observation of its 10th anniversary, and heard testimony from: Archibald Cox, Chairman of Common Cause; Lloyd N. Cutler, co-chair of the Ethics in Government Committee of the John F. Kennedy School of Government's Public/Private Careers Project; John C. Keeney, Acting Assistant Attorney General in the Criminal Division at the Department of Justice; Michael Josephson, President of the Josephson Institute for the Advancement of Ethics; Marshall J. Breger, Chairman of the Administrative Conference of the United States; and Dr. James D. Carroll of the Brookings Institution, accompanied by Dr. Robert N. Roberts of James Madison University.

On April 13, the Subcommittee focused on the performance of OGE, and heard testimony from: Frank Q. Nebeker, Director of the Office of Government Ethics; Rosslyn S. Kleeman, Senior Associate Director at the General Accounting Office; David H. Martin, former Director of the Office of Government Ethics; Kathleen A. Buck, Designated Agency Ethics Official and General Counsel of the Office of the Secretary of Defense; and Joseph D. Shine, former DAEO at the General Services Administration.

The overwhelming opinion of the witnesses at both days of hearings was that OGE should be reauthorized. And while many of OGE's statutory responsibilities were viewed as being carried out responsibly and without controversy, there were a number of questions raised about the operation of OGE and the ethics enforcement system in general. These concerns are reflected, for the most part, in the changes proposed to current law contained in the Committee-passed bill.

IV. Provisions of S. 2344

A. REAUTHORIZE THE OFFICE OF GOVERNMENT ETHICS FOR 6 YEARS

The Committee strongly believes that the need for OGE continues, and thus Section 8 of S. 2344, as reported, reauthorizes OGE for an additional six years. The six-year reauthorization will enable OGE to perform its expanded responsibilities during the next presidential transition (1992/93) before it is required to address its next reauthorization (1994). Also, the end of the six-year reauthorization will come two years after the expiration of the current OGE Director's term of office, thereby permitting the selection and confirmation of the Director prior to reauthorization.

B. ESTABLISHMENT OF OGE AS A SEPARATE AGENCY

Section 2 of S. 2344 removes OGE from OPM and establishes it as a free-standing agency in the Executive Branch. This section would not take effect until October 1, 1989, to allow OGE to postpone its new administrative responsibilities pursuant to this change until after the upcoming (1988/89) presidential transition period. Witnesses at both days of hearings testified that they believe OGE, as a unit of OPM, does not have the stature it needs to carry out its mandate; does not appear to be as independent as it needs to be; and would function better administratively as a separate agency. While the Committee has found no evidence that OPM has ever interfered in any substantive OGE policy decisions, the Committee believes that making OGE a separate agency is the logical next step in the direction Congress took in 1983 when it gave OGE greater powers of self-management. The Committee also seeks to enhance OGE's prestige and authority within the Executive Branch, given its important and highly sensitive responsibilities.

The witnesses who testified on this subject were unanimous, giving both policy and administrative reasons for their conclusion. Common Cause Chairman Archibald Cox testified:

> The hard reality is that the position of OGE's Director is essentially that of a second echelon official within OPM who some might view as having neither the stature nor the institutional support necessary to enforce effectively ethics rules or to serve as a highly visible public watchdog and spokesperson. As an independent entity, the Office of Government Ethics would have a higher public profile and its Director would be empowered with a stronger, more respected voice in the protection of ethical standards in the United States government.

GAO's Senior Associate Director, Rosslyn Kleeman, also explained to Senator Carl Levin, Chairman of the Subcommittee on Oversight of Government Management, why she believed OGE should be made a separate agency:

> Senator Levin. Ms. Kleeman, do you think the OGE's presence within the OPM structure has a chilling effect on OGE's performance, or could have a chilling effect?
>
> Ms. Kleeman. I think it probably does. We hear from so many people that OPM is a very political agency these

> days and I suspect that that does have a chilling effect. It certainly does not give the appearance of independence, being under the Office of Personnel Management.

Former OGE Director David Martin agreed. He also pointed out:

> In obtaining personnel, in representing your budgetary needs, in representing your needs to function and achieve what the obligations are in the Office, I think you can do a better job if you do not have to, first, submit everything through OPM and you can go directly to the OMB, and secondly, you can have maybe a better, more effective voice with the people who appropriate monies.

Current OGE Director Frank Q. Nebeker testified at the April 13 hearing that, although OPM had not attempted to exert any "command influence" on OGE decision making, "I think from a logistical administrative standpoint, the Office could function better if we were independent in the sense of numerous other agencies that operate under the auspices of GSA. We have inquired into that mechanism, and it seems to be an attractive one."

In addition to removing OGE from OPM, Section 2 of S. 2344 permits the OGE Director to appoint officers and employees and to contract for financial and administrative services with the General Services Administration (GSA) or another federal agency. Currently, 34 commissions, committees, boards, and small agencies are provided administrative support services by GSA, including the Consumer Product Safety Commission, the Equal Employment Opportunity Commission, and the National Credit Union Administration. The Committee expects that the funds currently appropriated to OPM to support the operation of OGE will be transferred to OGE. Based on discussions with OGE, the Committee believes that the added costs of making OGE a free-standing agency will be minimal.

C. REMOVAL OF THE OGE DIRECTOR "FOR GOOD CAUSE"

In a matter closely related to the issue of OGE independence, Section 3 of S. 2344 permits the removal of the OGE Director only "for good cause." Good cause removal for the OGE Director was adopted by the Senate in the 1983 reauthorization bill, but was eliminated in conference.

The OGE Director is in a unique position in the Executive Branch. He or she may be called upon to rule on the behavior of close friends or associates of the President, high-level members of the President's administration, or even the President himself, and to recommend sanctions where appropriate. As the Supreme Court said in *Humphrey's Executor* v. *United States, 295 U.S. 602, 629 (1935),* "it is quite apparent that one who holds his office only during the pleasure of another cannot be depended upon to maintain an attitude of independence against the latter's will."

OGE Director Nebeker testified that he believes that good cause removal would be helpful for future Directors to have a "greater degree of appointment independence" than he has when serving at the pleasure of the President. Common Cause Chairman Archibald Cox also testified in favor of "good cause" removal, saying that the

OGE Director "should have the same status in that regard as the heads of the various independent administrative agencies."

On May 18, 1988, the Department of Justice and OGE provided the Committee written comments on S. 2344. The Justice Department siad that making the OGE Director removable for good cause "would unconstitutionally infringe (sic) the President's authority over an agency performing purely executive functions, and undermine OGE's ability to carry out the responsibilities given it elsewhere in the bill." The Department of Justice said it would recommend that the President veto the bill, principally because of its "manifest interference with the President's authority to supervise executive branch officials." The OGE Deputy Director and staff concurred with the views of the Department of Justice on this point.[2] The Justice Department took a similar position on this issue during the 1983 reauthorization when the Senate approved "good cause" removal for the OGE Director. The Department is challenging the independent counsel statute in the Supreme Court on the same argument. *Morrison* v. *Olson, No. 87-1279.* The Supreme Court will not resolve the case until later this Term, but this Committee expressed its constitutional view when it reauthorized the independent counsel statute last year.

The Committee believes that the "good cause" removal standard strikes an appropriate balance between the need to guarantee independence and the need to safeguard against abuses of power by the Director. It bars the President from firing an OGE Director for performing his or her statutory responsibilities. However, if the President determines that the Director is disabled or guilty of misconduct or that there is other similar "good cause" for removal, the President can remove the Director. If the Director believes the removal was not for good cause, he or she may file suit in federal court. The Committee intends that this standard for removal is the same as that for the heads of the independent agencies.

Establishment of the "good cause" standard will, upon enactment, apply to the current OGE Director, but should not affect his appointment or tenure. The Committee believes that federal case law indicates that it is lawful and appropriate both to expand an incumbent officer's official duties without reconfirmation and to enhance the tenure protection of an office, including its incumbent. See *In re Koerner, 800 F.2d 1358 (5th Cir. 1986); In re Benny, 812 F.2d 1133(9th Cir. 1987).* Thus, the Committee expects that the current OGE Director should be able to continue to serve the five-year term to which he was nominated and confirmed and will not have to undergo reappointment.[3]

D. UPGRADE OGE DIRECTOR POSITION TO EXECUTIVE LEVEL III

In another move to improve the stature of OGE, and thereby give the Director more enforcement authority, Section 9 of S. 2344 raises the annual pay of the Director from Level V of the Executive Schedule to Level III. Currently, the position of OGE Director

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[2] OGE Director Nebeker did not comment on the specific provisions of the bill which affect the OGE Director's appointment, tenure, or pay.

[3] Congressional Research Service, American Law Division, "Constitutionality of Limiting Presidential Removal of an Incumbent Only for Cause," May 24, 1988.

is ranked below that of most departmental Inspectors General, whose pay is set at Level IV. Placement of the Director at Level III of the Executive Schedule would significantly raise the Director's status and signal the importance Congress attaches to this position. It would also put the OGE Director in a better position to represent OGE's interests and carry out OGE's responsibilities in what may be highly charged ethical matters involving very top administration officials.

E. CLARIFY DIRECTOR'S POWER TO ORDER AND RECOMMEND ACTION

Subsection 402(b)(9) of the Ethics Act gives the OGE Director the authority for "ordering corrective action on the part of agencies and employees which the Director deems necessary." Several witnesses at the hearings raised a number of questions involving this "corrective action" authority, which the Committee bill has tried to address.

The Committee believes OGE's statutory authority to order action is clear. With respect to enforcement of the conflict of interest and ethical conduct standards in individual cases, OGE has the specific statutory authority to take an active role in enforcement of such standards at the agency level on its own initiative by way of ordering agency or individual action. The Department of Justice has specifically recognized this authority in a 1983 letter to the House Judiciary Committee and the House Post Office and Civil Service Committee, which said, *inter alia:*

> The OGE develops rules which regulate the executive branch, interprets rules issued by the President, and even orders action by executive branch officials and departments.
>
> * * * * *
>
> OGE's statutory duties encompass considerable authority to direct other executive branch agencies.[4]

In its May 1988 letter to the Committee on S. 2344, however, the Department of Justice reversed its position. There, the Department contended that OGE's current power to monitor compliance by agencies and employees is limited to financial disclosure reviews and that permitting OGE to order or recommend action in other areas "would affect a major change in the role OGE has played within the executive branch." Similarly, OGE said in its May 1988 letter to the Committee that this Section "effects a significant change of responsibility in the role of the Director of OGE" because it provides an investigatory role and authority to order action. However, one month earlier OGE Director Nebeker testified before the Committee that he had the authority to order "corrective action" and that, in fact, he had recently ordered an individual to take action to end an ongoing violation of the standards of conduct and agency ethics regulations.

> Senator JOHN HEINZ. So you do take the position that [b][9] does give you the authority to insist upon corrective

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[4] H.R. Rpt. No. 98-89, Part I, at 19, 20. Letter of April 20, 1983; H.R. Rpt. No. 98-89, Part II, at 34, 35.

actions being taken and, if not, that you are empowered to take them yourself?

Judge NEBEKER. Yes, sir.

While the Committee believes the Director has the authority to order action, the Committee recognizes and supports the current decentralized system for the administration of ethics in the Executive Branch. Each agency has primary responsibility for ensuring compliance by its own employees with ethics laws, rules, regulations, and standards of conduct and for the administration of its own ethics program. In enforcement actions involving individual employees, OGE serves an important function as a back-up and resource for agency officials. Because of the decentralized ethics system, the Committee expects OGE to be the last resort in most cases.

Nevertheless, Congress does not intend that OGE play only a passive role of "resource" and "consultant" on ethics enforcement, or to become involved merely when requested by the agencies. The meaning of the statutory language in subsection 402(b)(9) is clear—OGE has the authority to order agencies and individual employees to take action when the OGE Director deems it necessary. OGE must intervene when an agency fails to meet its responsibilities to enforce ethics rules, regulations, or the standards of conduct. Also, OGE is not precluded from investigating any conflict-of-interest allegation which the Director believes merits review. Cases involving political appointees are likely to be the most visible, the most controversial, and the most difficult cases for agency heads to handle. In these difficult cases the Committee expects OGE to play a more active role, and, where appropriate, to assume primary responsibility. For example, if an agency is not investigating public allegations of a conflict of interest by a high-level official, OGE should initiate an investigation.[5]

During the Committee's consideration of S. 2344, Senators Ted Stevens and Warren Rudman expressed their concern that clarification of OGE's authority in this area not confuse the existing authority and responsibilities of other offices with regard to the enforcement of conflict of interest laws, rules, regulations, or standards of conduct. The Committee intends that this bill not disturb or limit the jurisdiction of the Department of Justice, any independent counsel, or any Inspector General regarding these matters. It simply makes clear the existing authority of the Director to order or recommend action.

Several questions were raised during the hearings regarding the Director's "corrective action" authority, including whether the Director has investigative authority, what types of action can be ordered, and how orders can be enforced.

1. OGE's investigative authority

To carry out its responsibility to order "corrective action," OGE must be able to investigate the underlying facts of a case to assess

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[5] Congressional Research Service, American Law Division, "Congressional Intent Concerning the Authority of the Office of Government Ethics Over Individual Ethics and Conflicts of Interest Matters," Aug. 7, 1986; and "Authority of the Office of Government Ethics to Order Agency or Employee Action," Sept. 26, 1986.

the merits of the allegation and to determine whether, and if so what, action should be taken. The Committee believes the current statute contains this investigative fact-finding authority. Although the Ethics Act provides no such explicit investigatory authority to the Director (other than with regard to the financial disclosure requirements of the Ethics Act in subsections 402[b] [3] and [5]), it is logically consistent and necessary for OGE to look at, examine, or conduct some kind of inquiry or study of a particular matter as a prelude to and as a concomitant part of its authority to order action.[6]

OGE Director Nebeker testified at the Committee's hearings that he was unsure whether he had the statutory authority to conduct a fact-finding investigation prior to the issuance of an order, and he recommended that the Ethics Act be amended to expressly provide that authority.[7]

> Senator LEVIN. What you need the express authority for, I think you are saying, and feel you do not have yet, is the authority to make findings of fact?
>
> Judge NEBEKER. That is correct.
>
> Senator LEVIN. Is that specific enough or must it say how you make findings of fact?
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> Judge NEBEKER. I do not think it needs to say how, although I would suggest that it do so in terms of language that is consistent with the Constitution, such as "after affording an opportunity to know the nature of the inquiry or charges and an opportunity to be heard, as required by law."

Despite the Committee's satisfaction that the current statute contains such authority, S. 2344 clarifies OGE's fact-finding authority by including in the Director's responsibilities the responsibility to, where appropriate, conduct investigations in order to make findings as to whether a violation of ethics rules, regulations, or standards of conduct has occurred. Those findings are to serve as the basis for OGE to order or recommend appropriate action by individuals or agencies.

2. Type of action ordered

Another issue raised by Committee witnesses was the type of "corrective action" the Director may order. Current law (subsection 402[b][4]) gives the Director the authority to recommend "appropriate action to correct any conflict of interest or ethical problem revealed" by a review of a financial disclosure form. And, as mentioned earlier, subsection 402(b)(9) gives the Director the authority to order action of both executive agencies and federal employees "which the Director deems necessary."

The Committee observed that there is confusion as to when it is intended that OGE order an agency to take a specific action, when

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[6] Congressional Research Service, American Law Divsion, "Congressional Intent Concerning the Authority of the Office of Government Ethics over Individual Ethics and Conflicts of Interest Matters," Aug. 7, 1986.

[7] However, in his May 18, 1988, letter to the Committee on S. 2344, OGE Director Nebeker contradicted his testimony when he said that he could not support the provision which provides an OGE investigatory role or clear authority to order corrective action.

it is intended the OGE order an individual employee to take action, and what type of action OGE can order an individual to take. Because of this confusion, the Committee decided it was necessary to be more explicit about OGE's authority in this area.

As to agencies, the Committee believes that the intent of subsection 402(b)(9) is to permit OGE to order an agency to conform its ethics program with OGE standards pertaining to agency eithics programs. Should the agency fail to comply with OGE's order, then the President would be called upon to resolve any conflict. The Committee believes it important that OGE have the authority to order an agency to comply with OGE requirements. This is an essential element in OGE's role as the overall expert in the area of ethics compliance, and the authority has been restated in Section 4 of S. 2344 (the new Section 402[b][16] of Title IV).

As to individuals, the Committee believes that the statute's "corrective action" language permits OGE to end an ongoing conflict of interest and to intervene with the employing agency to recommend sanctions against employee conduct the OGE believes merits sanctions. In the first situation, the Committee believes that OGE must have the ability to order an individual to take such action as the OGE deems necessary in order to end an ongoing conflict of interest. Such an order could require the employee to recuse or disqualify him/herself from a particular issue, require the employee to sell a particular holding, or require the employee to remove that employee's control over a particular investment. In the second situation, the Committee believes that while the authority to discipline a federal employee must remain with the employing agency, OGE should have the authority, based on its expertise in the area of conflict of interest and ethics requirements, to recommend to an agency that disciplinary action be taken in a particular case. Such disciplinary action is important in a context beyond the individual employee, since each ethics case may serve as precedent for future such cases, and since future conduct by all employees can be affected by the government's treatment of a particular employee.

OGE's authority to order action in these situations is spelled out in Section 5 of the bill in what would be a new section to the statute, Section 403. By clarifying the situations in which the OGE Director can order action, the Committee intends to make manifest what already can be inferred from current law: that the Director can order that individuals cease on-going conflicts of interest and can recommend disciplinary action.

3. Enforcement of orders

A final question raised by the hearing witnesses was how an OGE Director can enforce any order he or she issues. The Committee believes that, in the final analysis, the OGE Director's enforcement authority lies with his or her powers of persuasion and ability to appeal to the President and the public. According to the procedures outlined in Section 403, if an officer or employee fails to comply with an OGE order to take specific steps to end an ongoing conflict or the appearance of a conflict of interest, the OGE Director is required to bring such refusal to the attention of the officer's or employee's agency head. If the officer or employee involved in the allegation is the agency head, the Director must notify the

President. The same is true for actions OGE recommends be taken by agency heads against individuals. When an agency head refuses to take appropriate disciplinary action against an officer or employee in the face of an OGE recommendation to do so, the OGE Director is required to notify the President.[8]

In either circumstance, the OGE Director has the discretion to make OGE's findings, orders, and recommendations public. The Committee has a long-standing commitment to the OGE Director's authority to make such matters public. The Report of this Committee during the 1983 OGE reauthorization stated:

> The Committee strongly believes that the OGE should retain discretion over when to issue public statements. The ability to issue a public report is an important enforcement tool that can be particularly valuable in highly visible cases. Such public statements not only resolve the controversy surrounding such cases, but also increase public confidence in and awareness of the ethics program by indicating that an independent entity has reviewed the matter for ethical violations.

Of related concern to the Committee is the public availability of OGE records developed pursuant to the Director's authority to order or recommend action. In order to preclude overly broad Freedom of Information Act requests for information about OGE investigations, Section 5 of S. 2344 provides that such requests must be specific as to the identity of the person involved in the allegation and the subject of the allegation. Other exceptions to the disclosure provisions of the Freedom of Information Act (5 U.S.C. 552[b]) also remain in effect.

Another issue which arose during the Committee's consideration of S. 2344 concerned the rights of the officer or employee who is the subject of an allegation of ethical misconduct to respond to that allegation before OGE makes a finding. Section 5 of S. 2344 provides that the person may comment, either orally or in writing, before issuance of any OGE finding. The officer or employee may also request a hearing at which the person may rebut charges and present evidence in his or her defense.

F. PERMIT THE DIRECTOR TO USE INSPECTORS GENERAL

Since 1978 the Ethics Act has required executive agencies to make their services and personnel available to the OGE Director on request. The 1983 Senate-passed OGE reauthorization bill provided that, in addition, OGE could specifically request agency Inspector Generals (IGs) to assist in OGE investigations. That provision was modified in conference to apply only to OGE requests for IG assistance on financial disclosure reviews. Section 6 of S. 2344 would permit the OGE Director to request IG assistance in any investigation involving any of the Director's statutory responsibilities, not just financial disclosure reviews.

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[8] For purposes of this Section, where an agency is governed by a collegial body (e.g., a board or commission) and the allegation involves any member of the body, the Director should notify the President of the official's lack of response to an order to take action.

This provision does not represent a change in the Director's authority so much as a recognition of the current practice. Former OGE Director David Martin testified that he had requested IG assistance in investigations involving other than financial disclosure reviews and that the IGs were very cooperative. In two of the three instances where the Director has ordered specific action, agency IGs conducted the fact-finding investigation.

By using the resources available in other agencies to conduct investigations, OGE will not be taxing its own limited staff. Moreover, the IG offices are already charged with the responsibility of investigating conflict of interest cases and have the necessary experience and training to do so. The Committee expects OGE to utilize the services of the IGs and other agency resources to the maximum extent possible in the conduct of these fact-finding investigations.

G. PROTECT AGENCY ETHICS OFFICIALS

While OGE establishes overall ethics policies for the Executive Branch, the heads of each agency have primary responsibility for the operation of their agency's ethics program. OGE regulations (5 CFR 738.202) require each agency head to appoint a designated agency ethics official (DAEO) and an alternate to administer the agency's ethics program. DAEOs' responsibilities as to their own agencies include:

—Reviewing nomination and annual financial disclosure reports;
—Assessing the conformance of employees' activities with conflict of interest laws and regulations;
—Counseling current and departing agency personnel on ethics standards and programs;
—Periodically evaluating the ethics program; and
—Selecting deputy ethics officials to help run the program.

Thus, the DAEOs are the first line of education and defense in the Executive Branch ethics system.

Because the DAEOs are appointed by the agency head, they are dependent upon the agency head for management support and, in the final analysis, their very jobs. Most DAEOs are agency general counsels or high-level officials in the general counsel's office and, while some serve in career-reserve positions in the Senior Executive Service (SES), many are political appointees or serve in excepted service positions. As such, they have virtually none of the civil service protections afforded career employees in the competitive service or even the more limited protections of officials serving in career positions in the SES. As noted above, DAEOs are responsible for assessing whether an agency head, other top agency officials, or agency employees have complied with the standards of conduct and regulations governing conflicts of interest. DAEOs are also expected to report any possible violations of the conflict of interest laws to the Attorney General. Thus, they can be put in an extremely difficult position—required to review and report on their superiors' ethical behavior with limited protection from reprisal and no administrative appeal rights.

Mr. Joseph D. Shine, former DAEO at the General Services Administration, testified that it is difficult for the DAEO to act independently if the agency head or the agency head's close advisor is

involved in actual or apparent conflicts of interest. He testified that:

> OGE has no authority to protect the tenure of the DAEO in his position under this circumstance, or to insulate the DAEO from political pressure. This major weakness prevents the Federal Government from having a strong, independent and viable ethics program . . .
>
> If you are a GM/GS attorney-advisor serving as DAEO, you have no civil service tenure or protection. All GM/GS attorneys in the Federal government serve with excepted appointments. As an attorney, you may be removed, reassigned, or terminated without recourse to the Merit Systems Protection Board. Your job security does not have to be threatened directly, or indirectly. You realize if you displease the boss by taking strong actions, you may find yourself exiled to the Siberian gulag. What is left for the DAEO is to be fortified by his or her personal sense of ethics to do what is right.

What is needed, Mr. Shine said, is to ensure that DAEO's have certain civil service protections and administrative appeal rights.

S. 2344 attempts to address this deficiency. Section 4 of the bill requires that the position of DAEO be a career reserve position in the SES. As career SES officials, DAEOs would be able to appeal any act of retaliation to the Merit Systems Protection Board and/or the Office of Special Counsel.

In addition, Section 4 requires the OGE Director to provide "support to agency ethics officials, including helping to guarantee the integrity of the decisions of such officials." The current statute does not address OGE's role in supporting the decisions of the DAEOs, although former OGE Director David H. Martin testified that the Office has done so in the past. That support has taken the form of consulting with agency ethics officials as they develop ethics rulings and standing behind their decisions when it is appropriate to do so. The Committee believes that the exercise of independent judgment by DAEOs is so important that the statute should be explicit in vesting OGE with the authority to support, where appropriate, the judgments and actions of the DAEOs.

H. TRAINING OF POLITICAL APPOINTEES AND OTHER EMPLOYEES

Although the Ethics Act requires OGE to provide information on and promote understanding of ethical standards in executive agencies, there is no statutory requirement that OGE or any other agency provide employees with ethics training. While OGE Director Nebeker pointed out to the Committee that training individual employees is the primary responsibility of the agency in which the employee serves, OGE has assisted agencies in providing such training and has routinely conducted training programs for federal employees across the country. The Committee believes that these training programs are an important element in preventing conflict of interest problems and, therefore, has made OGE's responsibility in this area explicit in Section 4 of S. 2344.

Of particular concern to the Committee during OGE's 1983 reauthorization was the lack of awareness on the part of high-ranking

political appointees of the standards of ethical conduct. The Committee Report in 1983 stated that "steps should be taken to ensure that political appointees are fully aware of conflict of interest and other ethical requirements" and encouraged OGE to "place special emphasis on the education of top-level Executive Branch officials." The Committee believes that significantly more needs to be done in this area.

GAO testified that OGE still views training of high-level officials to be a problem. OGE attempted to develop a training program for these officials, but lack of resources prevented implementation. In lieu of such training, OGE sends a letter to all new presidential appointees informing them of their responsibility to become familiar with ethics laws and regulations. OGE Director Nebeker described this letter during OGE's reauthorization hearing as "a mighty brief briefing." OGE also provides training to some, but not all, high-level officials through sessions at the Federal Executive Institute.

OGE Director Nebeker pointed out to the Committee the importance of training high-level officials before they assume office:

> There is no question but what during the confirmation process you can get the full and individed attention whereas afterwards, the substantive duties are such that an ethics briefing is sort of like reading the Articles of War to a group of troops. It is a boring exercise that they really do not want to go through.

The Committee agrees and, through Section 4 of S. 2344, makes OGE responsible for "training incoming political appointees on ethics laws, rules, regulations, and standards of conduct." The Committee places great importance on this provision, and anticipates that it can be an effective way to develop greater awareness on the part of high-level political appointees of the ethical responsibilities of public service and heightened sensitivity to situations that may create appearances of conflicts of interest. In doing so, OGE's training may be able to prevent objectionable and improper conduct.

I. IMPROVE OGE'S ABILITY TO MONITOR COMPLIANCE

According to the 1978 Ethics Act, OGE has the responsibility to "cooperate with the Attorney General in developing an effective system for reporting allegations of conflict of interest laws to the Attorney General." However, GAO concluded in its June 1987 report on "Ethics Enforcement: Process by Which Conflict of Interest Allegations are Investigated and Resolved" (GAO/GGD-87-83BR) that the current system for referring conflict of interest cases is inadequate. That report indicates that neither OGE nor the Justice Department knows just how many ethics cases have been referred to the Justice Department for criminal investigation or the outcome of each of those cases. This lack of information hinders OGE's ability to meet its broader statutory responsibility of providing "overall direction of executive branch policies related to conflicts of interest." Without an understanding of the number and types of cases referred to the Justice Department and the outcome of those cases, OGE cannot adequately assess the quality of the Executive Branch ethics program.

Moreover, there is no clear guidance for IGs and other agency officials as to which office within the Justice Department an ethics case should be sent. An official in one U.S. Attorney's office described to GAO the process as "hit or miss" as to whether a U.S. Attorney or the Public Integrity Section should handle an ethics case, and said that, as a matter of course, the two offices do not notify each other when they receive a case or when they decide to prosecute or decline prosecution.

In addition, the Acting Assistant Attorney General in the Criminal Division, John C. Keeney, testified that although the Justice Department has a system for tracking ethics cases within the Department, he did not think it was "that effective." He stated that there are actually two data systems used by the Justice Department (one for the Public Integrity Section alone and one for the entire Department) and that he wasn't sure whether these two systems could be integrated for purposes of reporting overall statistics.

Finally, OGE is not informed by either the Justice Department or the referring agency when conflict of interest allegations are forwarded to the Justice Department for criminal investigation and possible prosecution. According to Acting Assistant Attorney General Keeney, the Justice Department informs OGE when prosecution is declined in conflict of interest cases referred to them. However, this declination may come months or even years after the allegation was initially sent to the Justice Department.

The Committee believes that OGE needs to work with the Justice Department to develop what the Ethics Act requires—"an effective system for reporting allegations of violations of the conflict of interest laws to the Attorney General." This should include clear guidelines to all federal agencies, particularly the IGs, as to which office in the Department of Justice different types of ethics cases should be referred. It should also include communication between the U.S. Attorneys and the Public Integrity Section as to when each office receives a referral. Further, it should include the development of a single or integrated data system so that the number and disposition of conflict of interest cases within the Justice Department can be determined.

Finally, OGE should be made aware of each ethics case referred to the Justice Department at the time it is referred, and should be promptly notified of the disposition of each case by the Justice Department. The system should include follow-up with the referring agency, particularly after a declination by the Justice Department, to determine what administrative action, if any, the referring agency took or should take. OGE will be in a better position to recommend action to the agency if it is kept informed of the status of each ethics case.

The Committee believes that OGE should make the establishment and operation of an effective system for overseeing the referral of ethics cases to the Justice Department and monitoring the progress of these cases a priority. To that end, S. 2344 contains a provision (Section 402[b][17]) directing OGE to do just that.

J. PERMIT OGE TO RECEIVE NON-REIMBURSABLE DETAILEES

Presidential transitions place tremendous pressures on OGE's small staff. OGE must not only counsel incoming and outgoing officials on their ethical responsibilities, they must also review and approve the financial disclosure forms of the Presidential nominees to be confirmed by the Senate. During the last transition in 1980–81, OGE received disclosure reports from 615 nominees. On average, OGE sent the reviewed report with an opinion letter to the Senate confirmation committee within four days of the appointee's nomination by the President. All but 15 of these reports reached the Senate prior to the first confirmation hearing. Steps had to be taken by over half of the nominees to shield them from conflicts of interest in their government positions. These steps frequently required resignation from a prior position or disqualification from certain official actions involving companies in which they held financial interests. During the 1983 reauthorization hearings, the Committee commended OGE for its fine performance during that transition.

To achieve that level of performance, however, virtually all other activities at OGE had to cease. Agency reviews had to be placed on hold and training and counseling activities had to be curtailed. OGE Director Nebeker testified that a similar cessation of activities will occur during the upcoming transition:

> The only practical way of handling the upcoming transition in administrations is to devote the bulk of OGE's time and resources to this single issue during the peak periods of activity. The entire staff will be divided into working teams in order to complete the review and certification process. By necessity, an interruption in such areas of responsibility as training, audits, and opinion writing will occur. If necessary, I will request the temporary transfer of knowledgeable people from other agencies to maintain the Office's regular activities and meet the needs of transition.

The Committee believes that OGE should utilize the services of other agency personnel as much as possible to facilitate the accomplishment of its transition responsibilities. Reimbursement to the loaning agency would, however, strain OGE's limited resources. OGE officials have told Committee staff that at least one agency has indicated that it would be willing to provide such personnel on a nonreimbursable basis. One sticking point, though, is the requirement in the Economy Act (31 U.S.C. 1501, *et seq.*) that appropriations to an agency be used only for the purposes for which they were appropriated. Decisions by the Comptroller General interpreting that Act have permitted nonreimbursable details if they involve limited numbers of employees for limited periods of time and have a negligible fiscal impact on the loaning agency's appropriation. For example, GAO permitted the details of eight employees from numerous agencies to the National Commission on the Ob-

servance of International Women's Year and the State Department over a two-year period.[9]

OGE officials have indicated that OGE would need the services of fewer detailees for a shorter period of time than the Comptroller General approved in that case. While the Committee believes that OGE's temporary use of such detailees would fall within the permitted exceptions, a clear authorization would resolve any questions. Thus, section 7 of S. 2344 permits any agency head to detail personnel and furnish other services to OGE with or without reimbursement.

K. INCREASE OGE'S AUTHORIZED APPROPRIATION

To accomplish the variety of responsibilities which OGE is called upon to perform, OGE's authorized appropriation levels should be increased. OGE's authorized appropriation has not been increased in the 10 years since it was created. With the increased attention being given to ethics in government issues recently, more demands are being placed on OGE than was expected when that authorization was established. Also, OGE Director Nebeker has indicated that, as funds permit, he would like to expand the Office to:

—implement a "desk officer" system in which an OGE management analyst would be assigned to each agency, thereby increasing the frequency of compliance reviews and providing more assistance to the agency;

—establish a statistical review and analysis unit to compile government-wide statistics on conflict of interest prosecutions and standard of conduct violations;

—establish a program management office to handle administrative duties; and

—create the position of public affairs officer and a position to oversee the conduct of compliance and awareness courses.

To do so, OGE hopes to increase its authorized staff size from 30 in fiscal 1988 to 53 by the end of FY 1990.

Recognizing the need for greater staff resources and the necessary transfer of appropriations from OPM to OGE when OGE becomes a free-standing agency, Section 8 of S. 2334 increases OGE's authorized appropriation from $2,000,000 to $2,500,000 for fiscal year 1989 and to $3,000,000 for each of the five years thereafter.

V. Other Committee Concerns

A number of other issues are of concern to the Committee, but are not addressed in S. 2344.

A. "CATCH-22" PREVENTS ADMINISTRATIVE ACTION

One of the major concerns raised at the hearings was the issue of OGE's routine deferral to ongoing Justice Department criminal proceedings. The Committee is very concerned that the administrative aspect of conflict of interest cases not be ignored in the face of possible criminal activity. While the Department of Justice must prosecute any violation of a conflict of interest statute that it

[9] Comptroller General Decision, B-182398, Mar. 29, 1976. See also Comptroller General Decisions, B-211373, Mar. 20, 1985, and B-221585, June 9, 1986.

deems appropriate, the responsibility of OGE and other agencies is to obtain compliance with ethics rules, regulations, and standards of conduct through administrative action. Possible administrative action included steps to stop an ongoing violation and possible sanctions as well, including ordering restitution, a reprimand, suspension, demotion, or dismissal. The administrative aspect of ethics enforcement is very important to achieving overall compliance and should not automatically vanish once a criminal investigation is commenced.

Two memoranda issued by former Attorneys General have served as guidelines for handling the criminal and non-criminal aspects of ethics cases. The first memo was issued May 4, 1976, and states that any department or agency that refers a case to the Department of Justice "should suspend any further administrative investigation and/or interrogation of the employee with respect to the area of suspected criminality." The memorandum goes on to say, though, that:

> if such independent administrative investigation is desired by the department or agency, it should be coordinated with the interested United States Attorney, Division in the Department of Justice, and/or investigative agency to insure that such administrative action does not jeopardize the government's criminal investigation or prosecution.

Thus, investigations by OGE or other agencies of possible non-criminal ethics violations may proceed if the investigation is coordinated with the Department of Justice.

The second memorandum was issued June 4, 1980, and supplements the 1976 memorandum by providing specific advice on how to proceed in a simultaneous non-criminal investigation. It stipulates that certain warnings—commonly referred to as the "Miranda warnings"—should be given whenever a federal employee is requested to provide evidence on a voluntary basis in connection with administrative misconduct proceedings. The purpose of the warnings is to prevent those providing statements in an administrative investigation from attempting to prevent their use by the Department of Justice in subsequent criminal litigation. Thus, not only are administrative investigations allowed, but procedures exist for the simultaneous conduct of administrative and criminal investigations.

Despite the opportunity to proceed administratively provided by these memos, OGE Director Nebeker testified that he would automatically suspend the work of his Office in the face of a criminal investigation. He stated that "it is the rule that the administrative process awaits the criminal investigative process," and that if the Justice Department requested his Office to stop an administrative investigation he would do so. OGE Director Nebeker's reluctance to proceed with administrative action or to coordinate such action with the Justice Department was made clear in his response to questions from Senator William Cohen, Ranking Minority Member of the Subcommittee on Oversight of Government Management, at the hearing:

> Senator COHEN. If the Justice Department says, "we have a criminal investigation," is it your inclination to say "all right, we will cease and desist?" Or is it to say "come talk to us, let's talk and see if we cannot work it out?"
>
> What would be your attitude toward that situation? Does it depend upon how high up the official is? Does it depend on how low he might be? What is the general procedure you would follow in those cases?
>
> Judge NEBEKER. I guess the general procedure is that I would start with the presumption that if the request was made, it had a basis and I would honor it. Only in apparent exceptional circumstances would I challenge it and proceed from there.

Senator Cohen pointed out that Congress is often asked by the Justice Department not to inquire into certain matters because of an ongoing criminal investigation. In those instances, Congress has sought to avoid interfering with the criminal investigation while proceeding with its own investigation. While criminal investigators have an obligation to see that the laws are enforced, Senator Cohen said "we have a corresponding obligation . . . to decide whether or not changes in laws have to be made, whether existing laws may have been circumvented, and what needs to be done."

It also appears that few ethics cases are prosecuted by the Justice Department. A February 1988 GAO report on "Ethics Enforcement: Results of Conflict of Interest Investigations" (GAO/GGD-88-34) revealed that IGs at 10 Executive Branch agencies referred 124 allegations of violations of criminal conflict of interest laws to the Department of Justice in calendar years 1985 and 1986. The IGs told GAO that they believed that 112 of the 124 referrals involved a crime. At the time of the GAO report, the Department of Justice had prosecuted only two of these 124 referrals. The Justice Department had not decided whether to prosecute 13 of the referrals and had declined prosecution of 107. The IGs did not know what the Department of Justice had done with two on the referrals. Thus, over 98 percent of those cases brought to the Department of Justice by IGs—almost all of which the IGs believe involve a criminal offense—were not prosectued.[10]

While the Committee is in no position to judge how many of these cases should have been prosecuted by the Department of Justice, the statistics raise serious questions about ethics enforcement in the Executive Branch. Also, the low rate of prosecution by the Justice Department is compounded by the lack of administrative action taken in these cases by the referring agencies. The IGs told GAO that the agencies had taken administrative action on only 16 of the 112 allegations that they believed to be a crime and referred to the Department of Justice. At the time of the GAO report the agencies were considering whether to take administrative action on an additional 56 allegations.

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[10] At the time of the hearing, Acting Assistant Attorney General Keeney said that he was not sure how GAO had counted the cases in their study. GAO and the Justice Department are currently verifying the data in the GAO study. At the time of this report that verification had not been completed.

In his testimony, Acting Assistant Attorney General Keeney said that the availability of administrative action is one reason why Justice would decline to prosecute a conflict of interest allegation. The June 1987 GAO report stated that when the Justice Department declines prosecution of a case, the referring agency is commonly sent a short letter of declination which does not indicate why prosecution was declined or whether the Department of Justice relieves administrative action is warranted. One IG told GAO that lack of Justice Department prosecution may inhibit agencies from taking administrative action, particularly when Justice expresses no opinion on the merit of the case or the appropriateness of administrative action.

During Acting Assistant Attorney General Kenney's testimony before the Subcommittee, Senator Levin expressed his deep concern that the administrative proceedings were being slighted and that the consequence was that little or no action was taken once a criminal prosecution was declined:

> We are in kind of a Catch-22 situation. We defer for criminal investigation, and if possible, criminal prosecution. Sometimes that takes a long, long time. And then, in 98 percent of the cases it is declined. By then, either a lot of time has gone by and the administrative procedure, which you say is relevant, frequently is now much more difficult to do. But secondly, sometimes the refusal to prosecute is used as a clean bill of health . . . (preventing) and administrative procedure under the ethics laws.

The Committee is concerned that the Attorneys General memoranda on the investigation of criminal and non-criminal aspects of a conflict of interest allegation is being misinterpreted and is contributing to this "Catch-22" situation. The Committee believes that the 1976 Attorney General memorandum does not preclude an administrative investigation while a criminal investigation is ongoing. The memo specifically permits administrative review "if such independent administrative investigation is desired by the department or agency" as long as it is coordinated with the Justice Department. OGE and the agencies should not automatically defer an administrative investigation in a case when the Justice Department requests them to do so. That decision should be made on a case-by-case basis. As Acting Assistant Attorney General Keeney said in his testimony before the Subcommittee, "Generally an agency is not bound by a prosecutor's request that administrative action be deferred." OGE should, of course, be sensitive to the possibility of unduly influencing the criminal investigation in any administrative investigation it chooses to pursue and should closely coordinate its actions with the Department of Justice.

The Committee also believes that the Justice Department should tell OGE or any referring agency why prosecution is declined in a case and whether the Justice Department believes it merits administrative action. Assistant Attorney General Keeney told the Subcommittee that the Justice Department's policy of not setting forth the reasons for declination is, in fact, changing. He said that if the Justice Department believes that administrative action is appropriate, "we either try to set forth in the letter or tell them of the

availability of our people to discuss the matter with them." Declination of a case for criminal prosecution should not inhibit agencies from taking administrative action where appropriate. While the Justice Department's opinions are important, the Committee believes that the final decision on such action, or course, remains a matter for the referring agency and OGE. The Committee plans to monitor this situation closely.

B. STATUTES AND REGULATIONS SHOULD BE REVIEWED

Subsections 402(b)(12) of the Ethics Act requires OGE to evaluate the need for changes in rules and regulations regarding conflict of interest and ethical problems. GAO testified that the DAEOs it interviewed as part of its review of OGE believed the ethics regulations OGE has issued are helpful, but several felt that they could be improved. They believed that the regulations in general need to be clarified, should include more examples, and older regulations should be reviewed and updated. GAO testified that they agreed with these recommendations.

In addition, several of the DAEOs and agency officials with whom GAO spoke in a previous review, including two IGs, said additional regulations are needed for the conflict of interest statutes involving current employees. One statute particularly mentioned by the agency officials was 18 U.S.C. 208, which prohibits current employees from participating in matters which they know will affect their financial interest. Regulatory definition of key terms used in these statutes would, in their opinion, help in identifying prohibited conduct.

An example of the need for regulations for 18 U.S.C. 208 is the current status of the interpretation of the term "particular matter" in that statute. On January 12, 1987, the Department of Justice's Office of Legal Counsel issued a memorandum to the Solicitor of the Department of the Interior stating that the term "particular matter" in section 208 included rulemaking and other matters of general applicability. This interpretation of a "particular matter" is different than that provided in regulations for the post-employment conflict of interest statute (18 U.S.C. 207, with regulations at 5 CFR 737), which says that a "particular matter" does not include rulemaking or policy issues. In response to the Office of Legal Counsel memo, an amendment to the Continuing Resolution was passed in December 1987 providing that Department of the Interior and Indian Health Service employees would use the U.S.C. 207 interpretation of "particular matter" in relation to 18 U.S.C. 208, while the rest of the government would use the interpretation set forth in the Office of Legal Counsel's memorandum for 18 U.S.C. 208. Thus, no government-wide interpretation of the term currently applies for this important criminal conflict of interest statute.

OGE told GAO that the best way to define key terms used in the conflict of interest statutes is through amendments to the statutes. Although Title IV of the Ethics Act gives OGE the responsibility of assisting the Attorney General in evaluating the effectiveness of the conflict of interest laws and recommending appropriate amendments, OGE has not conducted such a review or recommended any

such amendments to the Attorney General. In his answers to prehearing questions, though, OGE Director Nebeker said that he believes a comprehensive review of the conflict of interest statutes may be needed:

> A thorough review of all of the criminal conflict of interest statutes has not occurred since 1962, when the statutes were recodified into ch. 11 of Title 18, United States Code. Because of the significant changes in the workforce and the types of financial interests now held by many individuals either currently serving or considering serving in the executive branch, it may very well be time to review these statutes again on a comprehensive basis.

He particularly noted the need for review of 18 U.S.C. 208 as it relates to the financial interests of a spouse, of sections 203 and 205 regarding representations made by federal employees who live in the District of Columbia, and the provisions which apply to special government employees.

The Committee agrees with OGE Director Nebeker, and believes a review of the conflict of interest statutes is needed. OGE should work with the Department of Justice on that review and should revise existing regulations where appropriate. OGE should also strongly consider issuance of regulations for the conflict of interest statutes affecting current employees, particularly 18 U.S.C. 208. If OGE does not consider issuance of such regulations to be appropriate, OGE should assist the Attorney General in recommending appropriate amendments to the statutes to eliminate existing confusion and inconsistency.

C. FINANCIAL DISCLOSURE REVIEWS ARE UNTIMELY

As mentioned previously, Title II of the Ethics Act requires OGE to review financial disclosure reports within 60 days after they are transmitted to OGE. The Committee is concerned, however, that these reviews are extending well beyond the 60-day limit. In 1987, the Subcommittee on Oversight of Government Management reviewed OGE files for the financial disclosure reports of 10 high-ranking Government officials to see, among other things, how long it took OGE to complete their reviews. The Subcommittee found that the 60-day time limit was exceeded in 9 out of the 10 cases; in 7 of the cases, OGE waited over 6 months before approving the form; in two cases OGE never approved disclosure forms submitted to it over several years.

In response to prehearing questions, OGE Director Nebeker said:

> (T)he Office recognizes that under section 206(a) of the Act, OGE is to review reports transmitted to it within 60 days of receipt. While our reviews begin within the 60 day period, experience has shown that over 70% of the statements we receive require us to request additional information to complete a report or for this Office to make an adequate review. We pursue this information with diligence, but *we deem the statute to require completion of the process within 60 days of adequate information being supplied* (emphasis added). We meet that deadline.

The Committee does not view the requirement in Title II of the Ethics Act requiring OGE review "within 60 days of the date of transmittal" as permitting the delay of the start of their review until such time as OGE receives what it believes to be "adequate" information. Using this definition, disclosure reviews can continue indefinitely. Also, the Committee believes that OGE should notify the individual submitting the report if its review must extend beyond the 60-day limit. Otherwise, the individual may assume that the report has been approved, when in fact it may still be under review.

D. MORE FREQUENT AGENCY MONITORING NEEDED

OGE told the Committee that they try and monitor agency ethics programs every three years, but admitted that they seldom meet this goal due to lack of staff. Two former OGE Directors told GAO during its review that even if OGE's triennial review schedule were met, it would be insufficient to properly assess the agencies' ethics programs. Former agency ethics official Shine testified that he agreed with that assessment. As part of OGE's planned increase in resources over the next few years, the Committee believes the Director should devote part of those resources to more frequent agency compliance reviews.

VI. Committee Action

The Subcommittee on Oversight of Government Management, to which S. 2344 was referred, polled out the bill and reported it to the full Committee for consideration. The polling vote was seven in favor and one opposed. The Committee met on May 19, 1988, to consider S. 2344. During the Committee's consideration of the bill, Senators Rudman and Stevens expressed concern about the bill's clarification of OGE's authority to order action on the part of individual employees and agencies. While they were in support of continuing OGE's authority in this area, they were concerned about the extent to which employees who are the subject of OGE investigations are permitted an opportunity to respond to OGE's investigation and possible findings.

While it is expected that OGE would not make a finding or issue an order without first hearing from the officer or employee who is the subject of the allegation, Senators Rudman and Stevens requested that the opportunity for such comments be made explicit in the statute. Moreover, the Senators believed that, where requested by an officer or employee who is the subject of an OGE investigation, the employee should be entitled to a hearing. These provisions were contained in an amendment offered by Senators Levin and Cohen at the Committee mark-up. That amendment also included a number of technical corrections that needed to be made to the Subcommittee-passed bill. The Levin-Cohen amendment was passed by the Committee unanimously on a voice vote.

Also, during the Committee mark-up session, Senator Rudman offered an amendment limiting the extent to which OGE's files on individual cases should be available to the public. The amendment, which was adopted unanimously on a voice vote, limits the public's access under the Freedom of Information Act to OGE's files on in-

dividual ethics cases to only specific requests for information or documents pertaining to a particular individual and a particular allegation involving that individual. This limitation is intended to avoid so-called "fishing expeditions" on the part of the public and the press.

A quorum being present, the Committee ordered S. 2344 to be favorably reported as amended by voice vote.

VII. Section-by-Section Analysis

Section 1

The first section specifies that S. 2344 will be known as the "Office of Government Ethics Reauthorization Act of 1988."

Section 2

Section 2 amends section 401 and 402 of the Ethics in Government Act of 1978, establishing the Office of Government Ethics as a separate executive agency and permitting OGE to contract with another federal agency for financial and administrative services.

Section 3

Section 3 amends section 401(b) of the Ethics Act to make the Director removable only for good cause.

Section 4

Section 4 amends section 402(b) of the Ethics Act, reordering and clarifying the responsibilities of the Director. The Director is now clearly responsible for:

—investigating, making findings, and ordering or recommending action with regard to alleged violations of conflict of interest rules and regulations and employee standards of conduct;
—developing rules on ordering and recommending action;
—training both incoming political appointees and all officers and employees on ethics laws, rules, regulations, and standards of conduct;
—supporting the decisions of agency ethics officials.

The position of designated agency ethics official or DAEO is required to be a career reserved position in the Senior Executive Service. Also, OGE must be informed when a conflict of interest allegation is referred to the Attorney General.

Section 5

Section 5 inserts a new section 403 into the Ethics Act and redesignates sections 403 through 407 as sections 404 through 408. The new section 403 establishes the procedures by which the OGE Director may investigate conflict of interest allegations, issue findings, and order or recommend action. It also provides the person who is the subject of the allegation an opportunity to comment and, if requested, an opportunity for a hearing. Finally, the section stipulates that requests for information about an OGE investigation, finding, order or recommendation filed under the Freedom of Information Act be specific as to the identity of the person involved in the allegation and the subject matter of the allegation.

Section 6

Section 6 amends section 404 of the Ethics Act (as redesignated), permitting the Director to request the assistance of Inspectors General in carrying out any of the Director's responsibilities. It also permits agency heads to detail personnel and provide services to OGE with or without reimbursement.

Section 7

Section 7 amends section 405 of the Act (as redesignated), adding the title "Rules and Regulations" to the section.

Section 8

Section 8 amends section 406 of the Act (as redesignated), increasing OGE's authorized appropriation to $2.5 million for fiscal year 1989 and to $3 million for each of the next five fiscal years. Thus, OGE is reauthorized for six years.

Section 9

Section 9 increases the status and annual pay of the OGE Director from Executive Level V to Excutive Level III.

Section 10

Section 10 sets an effective date of October 1, 1988, for the provision of S. 2344, except that the provisions of section 2 shall take effect on October 1, 1989.

VIII. Estimated Cost of Legislation

U.S. Congress,
Congressional Budget Office,
Washington, DC, May 19, 1988.

Hon. John Glenn,
Chairman, Committee on Governmental Affairs,
U.S. Senate, Washington, DC.

Dear Mr. Chairman: The Congressional Budget Office has prepared the attached cost estimate for S. 2344, the Office of Government Ethics Reauthorization Act of 1988.

If you wish further details on this estimate, we will be pleased to provide them.

Sincerely,

James L. Blum,
Acting Director.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

1. Bill number: S. 2344.

2. Bill title: Office of Government Ethics Reauthorization Act of 1988.

3. Bill status: As ordered reported by the Senate Committee on Governmental Affairs, May 19, 1988.

4. Bill purpose: The bill would authorize the appropriation of $2.5 million in 1989, and $3 million for each of the following five fiscal years, for the Office of Government Ethics in the Office of Personnel Management (OPM). The 1988 budget authority for OPM is cur-

rently $101.8 million, of which $1.6 million is estimated for the Office of Government Ethics. The President's 1989 request for OPM includes $1.8 million for the Office of Government Ethics.

The bill also would make the Office of Government Ethics an independent agency beginning in 1990.

5. Estimated cost to the Federal Government:

[By fiscal year, in millions of dollars]

	1989	1990	1991	1992	1993
Authorization level	2.5	3.0	3.0	3.0	3.0
Estimated outlays	2.0	3.0	3.0	3.0	3.0

The costs of this bill fall within budget function 800.

Basis of estimate:

This estimate assumes the amount authorized will be appropriated. The estimate of outlays is based on historical spending patterns of OPM's salaries and expenses account.

6. Estimated cost to state and local governments: None.

7. Estimate comparison: None.

8. Previous CBO estimate: On March 17, 1988, the Congressional Budget Office prepared a cost estimate for H.R. 3997, a similar bill ordered reported by the House Committee on the Judiciary. That bill authorized $1.8 million for 1989 and necessary sums for the following years.

9. Estimate prepared by: Jim Hearn (226–2860)

10. Estimate approved by: James L. Blum, Assistant Director for Budget Analysis.

IX. Evaluation of Regulatory Impact

Pursuant to the requirements of paragraph 11(b) of Rule XXVI of the Standing Rules of the Senate, the Committee has considered the regulatory and paperwork impact of S. 2344, as well as the impact of the bill on personal privacy. Because of the discretion afforded the Director in carrying out his or her responsibilities and because the bill does not create any additional regulatory responsibility or authority on the part of the Director, the bill will impose no additional regulatory burden. On balance, the bill will have no significant impact on personal privacy or paperwork beyond that imposed by present law.

X. ADDITIONAL VIEWS OF MESSRS. STEVENS AND RUDMAN

In joining with our colleagues to report the bill, S. 2344, to the Senate, we made it clear that we continue to have concerns about specific provisions in this measure. Those concerns were raised with the Committee when this bill was reported and were the subject of correspondence from the Department of Justice. While some of those concerns have now been addressed to our satisfaction, we may, nevertheless, offer a clarifying amendment to S. 2344 when the bill is considered by the Senate.

While we whole heartedly support the reauthorization of the Office of Government Ethics, we are concerned that the bill, as reported, will deny to the President the ability to remove the Director of the Office of Government Ethics. An inherent power reserved to the President by the Constitution is the right to remove an Executive Branch official who is exercising a clearly executive function, i.e., the promulgation of rules and regulations with respect to the personnel practices of Executive Branch agency employees. In addition, when S. 2344 was ordered to be reported by the Committee, we were concerned that this reauthorization might serve to confuse and muddy the lines of jurisdiction between the Office of Government Ethics, the Criminal Division of the Department of Justice, the Office of Independent Counsel, and the statutory Inspectors General at the various Federal agencies with respect to the interpretation, investigation and litigation of conflict of interest questions. Our concern in this specific area has now been addressed by the Committee in its Report to accompany the bill.

As former Chairmen of the Senate's Select Committee on Ethics, we are aware of the need for a central authority to address and give interpretation to government "ethics issues" which, in the instance of the Office of Government Ethics, relate principally to "conflicts of interest" questions. As a former Attorney General and as a former United States Attorney, we are convinced of the need for an independent office with the Executive Branch which will supervise the public financial disclosure requirement for Executive Branch officials and will serve as the focal point for inquiries by such officials on matters of conflict of interest within the Federal government. The Office of Government Ethics has served that valuable role in the past and will continue to do so in the future under S. 2344.

Our primary concern with this bill, the unconstitutional denial of the President's ability to remove an Executive Branch official who is performing an obvious executive function, is shared by the Department of Justice. In that context, we call attention to a letter dated May 18, 1988 from the Acting Assistant Attorney General, Office of Legislative Affairs, to Chairman Carl Levin of the Sub-

committee on Oversight of Government Management. That letter makes clear that if this concern is not remedied by Congress before the bill is presented to the President, the Justice Department will be constrained to recommend to the President that he veto this reauthorization.

In addition, the Subcommittee has received a letter from the current Director of the Office of Government Ethics which comments upon specific provisions of S. 2344. In that letter, Director Frank Nebeker sets forth his view that the present statute under which the Office of Government Ethics operates has worked quite well and there is no present requirement that the statute be substantially modified. In fact, Mr. Nebeker, one of the most knowledgable officials in the government with respect to the workings of the Office of Government Ethics, states very emphatically that while S. 2344, is a proposal which is *"necessarily prompted by a need to continue the existence and functions of the Office, (it) goes even beyond the perceived need for some specific amendments. It purports to rearrange a familiar statutory format which is not in need of major structural change"* (emphasis added). Accordingly, he urges "that the specific amendments relating to status of the office, the duration and limit of authorized appropriations, and limited investigative and fact-finding functions" be adopted.

We are concerned that passage of S. 2344, described by some as a "simple reauthorization", might be seen by others as an expansion of O.G.E. authority, if not by statutory change, at least through a policy redirection by the Congress. We trust that the language included in the Report of the Committee at our suggestion will make it clear that this reauthorization is not intended to make the Office of Government Ethics paramount with respect to the investigation of "conflicts of interest" allegations in the Federal government.

No one wishes to see this bill be vetoed. It need not be vetoed. The narrowly drawn amendment which we will offer when this bill is brought to the Senate for consideration seeks to address the concern of the Department of Justice and therefore remove the likelihood of a veto. The Office of Government Ethics is a very important agency and serves a vital role within the Executive Branch. It must be reauthorized by the Congress on an expedited basis, but that reauthorization must be free of any unconstitutional limitation on the authority of the President.

TED STEVENS.
WARREN B. RUDMAN.

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF LEGISLATIVE AFFAIRS,
Washington, DC, May 18, 1988.

Hon. CARL LEVIN,
Chairman, Subcommittee on Oversight of Government Management, Committee on Governmental Affairs, U.S. Senate, Washington, DC.

DEAR CHAIRMAN LEVIN: This letter presents the views of the Department of Justice on S. 2344, a bill to reauthorize the Office of

Government Ethics (OGE) for six years. While the Department of Justice generally supports the reauthorization of OGE, we strongly oppose certain provisions of S. 2344. Specifically, we object to the bill's limitation on the President's ability to remove the Director of OGE during his term of office, and to its giving OGE authority to investigate, make findings, and order corrective action in connection with alleged violations of conflict of interest rules and standards of conduct. The first of these provisions would unconstitutionally infringe the President's authority over an agency performing purely executive functions, and undermine OGE's ability to carry out the responsibilities given it elsewhere in the bill. The second raises separate legal and policy questions relating to the effective allocation of law enforcement responsibilities among executive agencies, and power of agencies to enforce their own regulations, and the rights of individuals charged with violations. Together these objectionable provisions of S. 2344 would accomplish a fundamental change in the role OGE has played during the ten years since its establishment, a change which we believe will have a decidedly negative effect on the enforcement of conflict of interest laws and regulations within the executive branch. Unless the bill is amended to cure these defects, the Department will recommend that the President veto it.

A. REMOVAL OF DIRECTOR OF OGE

Under section 2 of S. 2344, OGE would be established as an "independent agency" in the executive branch, to be headed by a Director appointed by the President with the advice and consent of the Senate. See proposed section 401(a) of Title 5, App. Under section 3, the Director of OGE would serve for a term of five years, and be removable during his term of office only "for good cause." See proposed section 401(b). We object to this limitation on the President's power to remove the Director as inconsistent with the Constitution's command that the President "take Care that the laws be faithfully executed." U.S. Const. Art. II, sec. 3. Inherent in this authority, and obligation, is that officials of the government who exercise executive power must be accountable to the President. To limit the President's removal power over such individuals, particularly where they exercise authority that is not subject to the direction of some other executive official, is an unconstitutional infringement of the President's Article II Power. See *Meyers* v. *United States*, U.S. 52 (1926).

As this Department pointed out five years ago, upon the occasion of OGE's first reauthorization, the functions performed by OGE under the Ethics in Government Act are purely executive in nature, requiring the exercise of considerable executive discretion. See Letter from Robert A. McConnell, Assistant Attorney General, Office of Legislative Affairs, to Honorable Peter Rodino, Chairman, House Committee on the Judiciary, April 8, 1983.[1] OGE's responsibilities, as set forth in section 402 of the Ethics Act, include interpreting the conflict of interest laws applicable to executive branch

[1] An early version of the House bill reauthorizing OGE in 1983 contained a provision limiting the President's power to remove the Director. This Department objected to the provision on constitutional grounds, and it was deleted from the bill before it passed the House.

employees, developing and promulgating rules relating to standards of conduct for such employees, monitoring compliance with the public financial disclosure requirements of the Ethics Act as applicable to executive branch employees, and reviewing individual financial disclosure statements of executive officials to determine whether a conflict of interest is present. All of these responsibilities involve classic executive functions, and as such must remain subject to the President's supervisory control. See *Bowsher* v. *Synar,* 106 S. Ct. 3181, 3192 (1986); *Wiener* v. *United States,* 357 U.S. 349, 353 (1958).[2] The bill's attempt to insulate the Director of OGE from presidential authority by limiting the President's power to remove him from office thus raises the gravest constitutional concerns.

In addition to the constitutional concerns raised by the bill's removal provision, we believe it would alter OGE's role within the executive branch in a manner that would undermine its ability to carry out its various responsibilities under the Ethics Act. In our April 8, 1983 letter to Chairman Rodino we gave the following example of how the proposed change in OGE's status would effect existing law enforcement arrangements:

> Specifically, at the present time, OGE and this Department have a written agreement governing OGE's interpretation of the criminal conflict of interest statutes, and the Department's prosecutorial policy in matters with respect to which OGE has previously rendered advice. The exercise of prosecutorial discretion is a fundamental Executive function. It is questionable whether this Department would enter or continue such an agreement with any official who was not clearly within the Executive Branch and subject to the direction and control of the President. Without the assurance of a complementary prosecutorial policy, the opinions of OGE would be of little value to employees seeking definitive advice of conflict of interest matters. This is but one example, albeit significant, which indicates that the role of OGE would change dramatically if a limitation on the President's removal authority were to be enacted.

B. INVESTIGATIVE AND ENFORCEMENT AUTHORITY OF OGE

Section 5 of the bill would effect a major change in the role OGE has played within the executive branch. In addition to its existing rulemaking and advisory functions, the bill would give OGE significant new authority to conduct investigations and make findings concerning alleged violations of conflict of interest rules by executive branch employees. See proposed section 403(a)(1). Section 4 confirms that OGE's power to "monitor compliance" by agencies and employees would be extended beyond the financial disclosure provisions of the Act (as it exists under current law) to all "ethics rules, regulations, and standards of conduct . . . ," see proposed

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[2] Unlike the Wars Claims Commission at issue in *Wiener,* the OGE is not "established as an adjudicating body with all the paraphernalia by which legal questions are put to the test of proof." 357 U.S. at 354.

section 402(b)(3), and that its power to investigate and make findings on alleged violations would extend to any "applicable conflict of interest rules and regulations and employee standards of conduct." See proposed section 402(b)(3)(E).

In addition to the serious concern over these provisions generated by the bill's simultaneous attempt to insulate OGE's Director from presidential control, the bill fails to reconcile the expansion of OGE's investigatory authority with the existing responsibilities of the Department of Justice and agency investigatory units such as the Inspectors General. We believe this overlapping responsibility could conflict and interfere with this Department's ability to enforce the criminal conflict of interest laws.[3]

Furthermore, in cases not involving criminal violations, or where criminal prosecution has been declined, S. 2344 could seriously compromise agency enforcement mechanisms. The investigatory and enforcement provisions of S. 2344 do not make clear whether OGE or an agency has primary enforcement responsibility in matters arising under an agency's standards of conduct,[4] and could erroneously be construed to give OGE the power to overrule the determinations of responsible agency decision-makers. We believe that agencies should be encouraged to improve their own enforcement programs in the ethics area; this bill would instead tend to discourage such efforts.[5] Again, we believe that legislation attempting to give one executive agency power to direct action by another raises very serious constitutional issues, where the agency claiming the authority to direct is not itself subject to the direction of the President.

The authority given OGE in proposed section 403(b)(1), upon the finding of a violation of the conflict of interest rules or applicable standards of conduct, to "order the employee to take specific action to correct the violation," raises questions relating to the rights of individual employees receiving such an order. For example, the provision does not make clear whether an employee would have a right to present evidence, or even to be heard in his own defense, before being "ordered" to correct a violation. Moreover, the bill

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[3] The bill does not make clear, for example, the appropriate scope of an administrative inquiry in the context of an ongoing criminal investigation. It has been the longstanding position of this Department that administrative inquiries must not be allowed to compromise the integrity of a criminal investigation, and that any administrative inquiry related to a criminal investigation must be coordinated with the Department of Justice to ensure that the criminal investigation is not jeopardized. See Memorandum of Attorney General Levi to the Heads of Executive Agencies, May 4, 1976; Memorandum of Attorney General Civiletti to the Heads of Executive Agencies, June 4, 1980.

[4] Under current law, agencies are primarily responsible for the administrative enforcement of their standards of conduct, and OGE has no role in the investigation of particular cases not involving financial disclosure. Its power under section 402(b)(6) to "order corrective action on the part of agencies and employees which the Director deems necessary" must be understood in the context in which it appears. That is, it gives OGE no separate substantive enforcement power, but only implements the powers enumerated elsewhere in the Act. Thus we believe that OGE's investigative and enforcement power in particular cases under current law is limited to causes involving compliance with the public financial disclosure provisions of Title II of the Act. See section 402(b) (3), (4), (5). The only other authority given OGE in current law in individual cases is the authority to "consult, when requested, with agency ethics counselors and other responsible officials regarding the resolution of conflict of interest. . . ." Section 402(b)(7).

[5] We note that the expansion of OGE's investigative authority is apparently unaccompanied by any provision for increased staffing. We would estimate that, in order properly to carry out the responsibilities given it in the bill, OGE would probably have to have at least double its current staff and resources.

does not make clear what investigative tools OGE may use, or what mechanisms may be available for enforcing one of its orders.

Our final objection to the bill is to proposed section 402(b)(3)(G)(ii). This section refers to the requirement in existing law that allegations of a violation of the criminal conflict of interest laws by a federal employee be reported immediately to the Attorney General, see 28 U.S.C. 535, and also directs the development of a system to "ensure" that the Director of OGE has notice of any such allegation. There are many situations in which disclosure of information concerning allegations of criminal wrongdoing would interfere with criminal law enforcement processes, and be unfair to the individual involved. There are also some cases in which such disclosure would be contrary to the provisions of other laws (e.g. the independent counsel provisions of the Ethics in Government Act forbid disclosure of information concerning an investigation without leave of court, 28 U.S.C. 592(b)(3), 592(d)(2); Rule 6(e) of the Federal Rules of Criminal Procedure forbids disclosure of grand jury material). We believe this provision should be amended to permit disclosure by the Attorney General to OGE only in appropriate circumstances.

C. CONCLUSION

For the reasons set forth above, the Department of Justice opposes S. 2344 in its present form. As in the past, we object on constitutional grounds to the bill's attempt to insulate the Office of Government Ethics from the President's supervisory power. We also oppose, for all of the legal and policy reasons explained earlier in this letter, giving OGE investigative and enforcement power beyond that it already has under existing law. We believe that, during the ten years of its existence, OGE has been able to play an effective role in assisting executive agencies to understand and comply with conflict of interest rules and standards of conduct, precisely because of the cooperative relationship with other agencies its statutory responsibilities have fostered. Were OGE to be perceived as primarily an enforcement agency, many of the benefits of this relationship would be lost. Perhaps the greatest loss would be agencies' own sense of responsibility for the enforcement of ethics rules and standards of conduct among their own officials and employees.

Principally because of the bill's manifest interference with the President's authority to supervise executive branch officials, but also because of its almost certain harmful effect on the enforcement of conflict of interest laws and regulations within the executive branch, the Department of Justice would be constrained to recommend that the President veto this legislation should it be enacted in its present form.

The Office of Management and Budget advises that, unless the issues presented in this report are satisfactorily resolved, enactment of S. 2344 would not be in accord with the program of the President.

Sincerely,

THOMAS W. BOYD,
Acting Assistant Attorney General.

XI. Changes in Existing Law

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, and existing law in which no changes are proposed is shown in roman):

Ethics in Government Act of 1978

(Publc Law 95-521)

TITLE IV—OFFICE OF GOVERNMENT ETHICS

Sec. 401. (a) There is established [in the Office of Personnel Management an office] *in the executive branch of the United States an executive agency* to be known as the Office of Government Ethics.

(b) There shall be at the head of the Office of Government Ethics a Director (hereinafter referred to as the "Director"), who shall be appointed by the President, by and with the advice and consent of the Senate. [Effective with respect to any individual appointed or reappointed by the President as Director on or after October 1, 1983, the term of service of the Director shall be five years.] *The Director shall serve for a term of five years and shall be removed from office during such term only for good cause.*

(c) The Director may—

(1) appoint officers and employees, including attorneys, for the agency in accordance with chapter 51 and subchapter 3 of chapter 53 of title 5, United States Code; and

(2) contract for financial and administrative services (including those related to budget and accounting financial reporting, personnel, and procurement) with the General Services Administration, or such other Federal agency as the Director determines appropriate, for which payment shall be made in advance, or by reimbursement from funds of the Office of Government Ethics, in such amounts as may be agreed upon by the Director and the head of the agency providing such services.

AUTHORITY AND FUNCTIONS

Sec. 402. (a) The Director shall provide [in consultation with the Office of Personnel Management,] overall direction of executive branch policies related to preventing conflicts of interest on the part of officers and employees of any executive agency, as defined in section 105 of title 5, United States Code.

(b) The responsibilities of the Director shall include—

(1) developing, in consultation with the Attorney General [and the Office of Personnel Management] rules and regulations to be promulgated by the President or the Director pertaining to conflicts of interest and ethics in the executive branch, including rules and regulations [establishing procedures] for [the filing, review, and public availability of financial statements filed by officers and employees in the executive branch as required by title II of this Act;]—

[(2) developing, in consultation with the Attorney General and the Office of Personnel Management, rules and regulations to be promulgated by the President or the Director pertaining to the identification and resolution of conflicts of interest;

[(3) monitoring and investigating compliance with the public financial disclosure requirements of title II of this Act by officers and employees of the executive branch and executive agency officials responsible for receiving, reviewing, and making available financial statements filed pursuant to such title;

[(4) conducting a review of financial statements to determine whether such statements reveal possible violations of applicable conflict of interest laws or regulations and recommending appropriate action to correct any conflict of interest or ethical problems revealed by such review;

[(5) monitoring and investigating individual and agency compliance with any additional financial reporting and internal review requirements established by law for the executive branch;

[(6) interpreting rules and regulations issued by the President or the Director governing conflict of interest and ethical problems and the filing of financial statements;

[(7) consulting, when requested, with agency ethics counselors and other responsible officials regarding the resolution of conflict of interest problems in individual cases;

[(8) establishing a formal advisory opinion service whereby advisory opinions are rendered on matters of general applicability or on important matters of first impression after, to the extent practicable, providing interested parties with an opportunity to transmit written comments with respect to the request for such advisory opinion, and whereby such advisory opinions are compiled, published, and made available to agency ethics counselors and the public;

[(9) ordering corrective action on the part of agencies and employees which the Director deems necessary;

[(10) requiring such reports from executive agencies as the Director deems necessary;

[(11) assisting the Attorney General in evaluating the effectiveness of the conflict of interest laws and in recommending appropriate amendments;

[(12) evaluating, with the assistance of the Attorney General and the Office of Personnel Management, the need for changes in rules and regulations issued by the Director and the agencies regarding conflict of interest and ethical problems, with a view toward making such rules and regulations consistent with and an effective supplement to the conflict of interest laws;

[(13) cooperating with the Attorney General in developing an effective system for reporting allegations of violations of the conflict of interest laws to the Attorney General, as required by section 535 of title 28, United States Code;

[(14) providing information on and promoting understanding of ethical standards in executive agencies; and

[(15) developing in consultation with the Office of Personnel Management and promulgating such rules and regulations as the Director determines necessary or desirable with respect to the evaluation of any item required to be reported by title II of this Act.]

(A) the filing, review, and public availability of financial statements filed pursuant to title II of this Act;

(B) the identification and resolution of conflicts of interest and appearances of conflicts of interest, including procedures for ordering or recommending specific action pursuant to section 403 of this title; and

(C) the selection by the head of each executive agency of an individual as the designated agency ethics official, which position shall be a career reserved position (as defined under section 31329(a)(8) of title 5, United States Code) in the Senior Executive Service;

(2) interpreting rules and regulations issued by the President or the Director governing conflict of interest and ethical problems and the filing of financial statements;

(3) assisting the Attorney General in evaluating the effectiveness of the conflict of interest laws and in recommending appropriate amendments; and

(4) evaluating, with the assistance of the Attorney General, the need for changes in rules and regulations issued by the Director, the President, and the agencies regarding conflicts of interest and standards of conduct;

(5) providing information on and promoting understanding of ethical standards in executive agencies;

(6) training incoming political appointees on ethics laws, rules, regulations, and standards of conduct;

(7) training officers and employees on ethics laws, rules, regulations, and standards of conduct;

(8)(A) establishing a formal advisory opinion service to give advisory opinions on matters of general applicability or on important matters of first impression;

(B) providing interested parties with an opportunity to transmit written comments with respect to an advisory opinion under clause (i), before (to the extent practicable) giving such opinion; and

(C) compiling, publishing, and making such advisory opinions available to agency ethics counselors and the public;

(9) consulting with agency ethics counselors and other responsible officials regarding the resolution of conflict of interest problems in individual cases;

(10) providing support to agency ethics officials, including helping to guarantee the integrity of the decisions of such officials;

(11) monitoring and investigating compliance with the public financial disclosure requirements of title II of this Act by current and incoming officers and employees of the executive branch and executive agency officials responsible for receiving, reviewing, and making available financial statements filed pursuant to such title;

(12) monitoring and investigating individual and agency compliance with any additional financial reporting and internal review requirements established by law for the executive branch;

(13) conducting a review of financial statements to determine whether such statements reveal possible violations of applicable conflict of interest laws, rules, or regulations or employee standards of conduct and ordering or recommending specific action pursuant to section 403 of this title;

(14) requiring such reports from executive agencies as the Director determines necessary;

(15) in accordance with section 403, investigating and making findings on alleged violations of applicable conflict of interest rules and regulations and employee standards of conduct by any executive branch officer or employee, as the Director determines appropriate, and ordering action, recommending action, or both;

(16) ordering the head of any agency to conform the ethics program of such agency with the Office of Government Ethics requirements, as the Director determines appropriate; and

(17) cooperating with the Attorney General in developing an effective system for—

(A) reporting allegations of violations of the conflict of interest laws to the Attorney General, as required under section 535 of title 28, United States Code; and

(B) ensuring that the Director has notice of any such allegation when such allegation is referred to the Attorney General.

(c) In the development of policies, rules, regulations, procedures, and forms to be recommended, authorized, or prescribed by him, the Director shall consult when appropriate with the executive agencies affected and with the Attorney General.

(d)(1) Any rules or regulations issued under section 402 of the Ethics in Government Act of 1978 which are in effect immediately before the effective date of the amendments made by this Act shall remain in effect according to their terms until modified, superseded, set aside, or revoked on or after such effective date.

(2) The responsibilities of the Director of the Office of Government Ethics under paragraphs (6) and (12), respectively, of section 402(b) of the Ethics in Government Act of 1978, with respect to rules and regulations issued by the Office of Personnel Management before the effective date of the amendments made by this Act shall not be affected by this Act or any of the amendments made by this Act.

ORDERING AND RECOMMENDING ACTION

SEC. 403. (a)(1) Pursuant to the provisions of section 402(b)(15), the Director may conduct an investigation and make findings concerning any allegation of violations. Prior to the issuance of any such finding, the Director shall provide the officer or employee who is the subject of the allegation with an opportunity to comment, either orally or in writing, and, if requested by such officer or employee, an opportunity for a hearing.

(2) The Director shall send any such finding to the officer or employee involved in the allegation and the head of the agency of such officer or employee. If such officer or employee is the head of an agency, the Director shall send such finding to the President.

(b)(1) If the Director finds that a violation of the conflict of interest rules or regulations or of the standards of conduct is occurring, the Director shall order the officer or employee to take specific action to end the violation, including but not limited to, divestiture, recusal, or the establishment of a blind trust.

(2) The Director shall send a written copy of such order to the head of the agency of such officer or employee. If such officer or employee is the head of an agency, the Director shall send a written copy of such order to the President.

(c) If the Director finds that a violation of the conflict of interest rules or regulations or of the standards of conduct is occurring or has occurred, the Director may recommend to the head of the agency of such officer or employee that such agency head take a specific administrative action against the officer or employee, including but not limited to reprimand, suspension, demotion, or dismissal. If such officer or employee is the head of an agency, the Director may recommend that the President take such action.

(d)(1) If the Director determines that an officer or employee has not taken appropriate action within a reasonable period of time after the Director orders such action under subsection (b), the Director shall notify in writing the head of the agency of such officer or employee of such determination. If such officer or employee is the head of an agency, the Director shall notify the President.

(2) If the Director determines that the head of an agency has not taken appropriate administrative action within a reasonable period of time after the Director recommends action under subsection (c), the Director shall notify in writing the President of such determination.

(e) Notwithstanding any other provision of law, no record developed pursuant to the authority of this section shall be made available pursuant to section 552(a)(3) of title 5, United States Code, unless the request for such information is specific, both as to the identity of the individual to whom such records relate and the subject matter of any alleged violation to which such records relate; that nothing in this subsection shall affect the application of the provisions of section 552(b) of title 5, United States Code to any record so identified.

ADMINISTRATIVE PROVISIONS

SEC. [403] *404.* Upon the request of the Director, each executive agency is directed to—

(1) make its services, personnel, and facilities available to the Director to the greatest practicable extent for the performance of functions under this Act; and

(2) except when prohibited by law, furnish to the Director all information and records in its possession which the Director may determine to be necessary for the performance of his duties.

The authority of the Director under this section includes the authority to request assistance from the inspector general of an agency in conducting investigations [pursuant to subsections (b)(3) and (b)(4) of section 402] *pursuant to the Office of Government Ethics responsibilities under this Act. The head of any agency may detail such personnel and furnish such services, with or without reimbursement, as the Director may request to carry out the provisions of this Act.*

RULES AND REGULATIONS

SEC. [404] *405.* In promulgating rules and regulations pertaining to financial disclosure, conflict of interest, and ethics in the executive branch, the Director shall issue rules and regulations in accordance with chapter 5 of title 5, United States Code. Any person may seek judicial review of any such rule or regulation.

AUTHORIZATION OF APPROPRIATIONS

SEC. [405] *406.* There are authorized to be appropriated to carry out the provisions of this title, and for no other purpose—

[(1) not to exceed $2,000,000 for the fiscal year ending September 30, 1979; and

[(2) not to exceed $2,000,000 for each of the nine fiscal years thereafter.]

(1) not to exceed $2,500,000 for the fiscal year ending September 30, 1989; and

(2) not to exceed $3,000,000 for each of the five fiscal years thereafter.

[ANNUAL PAY

[SEC. 406. Section 5316 of title 5, United States Code, is amended by adding at the end the following new paragraph:

["(146) Director of the Office of Government Ethics.".]

ANNUAL PAY OF DIRECTOR

SEC. 407. Chapter 53 of title 5, United States Code, is amended—

(1) in section 5316 by striking out:

"Director of the Office of Government Ethics.",

and

(2) in section 5314 by adding at the end thereof:

"Director of the Office of Government Ethics.".

SUBMISSION OF BUDGET

SEC. [407] *408.* (a) In the budget submitted to the Congress pursuant to section 1105(a) of title 31, United States Code, the President shall include estimated expenditures and proposed appropriations the President decides are necessary to support the Office of Government Ethics in the fiscal year for which the budget is submitted and the four fiscal years after that year.

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